No. 13-95

In the

Supreme Court of the United States

DAVID UNGER, Petitioner

v.

RUDOLPH YOUNG, RESPONDENT

MOTION TO PROCEED IN FORMA PAUPERIS

The Respondent, by and through his undersigned counsel, asks leave to file a Brief in Opposition to a Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39 of the Supreme Court Rules. Pursuant to 18 U.S.C. § 3006A, Respondent was granted leave to proceed in forma pauperis by both the United States Court of Appeals for the Second Circuit and the United States District Court for the Western District of New York and those courts appointed the undersigned as counsel for Respondent in the courts below. Respondent remains indigent and incarcerated at the Wyoming Correctional Facility, 3203 Dunbar Road, Attica, New York 14011-0501.

This the 15th day of August 2013.

Respectfully submitted,

/s/Brian Shiffrin
Brian Shiffrin, Esq
Easton Thompson Kasperek Shiffrin LLP
16 Main Street, Suite 243
Rochester, New York 14614
Tel: 585.423.8290
Counsel of Record

No. 13-95

In the

Supreme Court of the United States

DAVID UNGER, Petitioner

v.

RUDOLPH YOUNG, RESPONDENT

On Petition for a Writ of Certiorari
to the United States Court of Appeals For the Second Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

Brian Shiffrin, Esq..
Attorney for Rudolph Young,
Easton Thompson Kasperek Shiffrin LLP
16 West Main Street, Suite 243
Rochester, New York 14614
(585) 423-8290
bshiffrin@etksdefense.com
Counsel of Record

John H. Blume
Cornell Law School
112 Myron Taylor Hall
Ithaca, NY 14853-4901
(607) 255-1030

RESPONDENT'S QUESTIONS PRESENTED

In this case, a panel of the United States Court of Appeals for the Second Circuit unanimously affirmed the District Court's judgment holding that the New York Court of Appeals' decision finding an "independent source" for an in-court eyewitness identification, which occurred after a concededly unconstitutional in-person lineup, both involved an unreasonable application of clearly established federal law and was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. In the Court of Appeals, the State did not in any real sense contest the correctness of the District Court's decision (the merits discussion was relegated to a footnote); rather, after four years of litigation and numerous filings in the District Court addressing the merits of Young's claims, the State asserted for the first time on appeal that Young's contention that there was no independent source for the in-court lineup could not be reviewed on habeas because of *Stone v. Powell's* non-jurisdictional bar to the relitigation of Fourth Amendment claims. The panel concluded that the State's right to assert a procedural bar relying on *Stone* was waived, not only because it was not timely raised, but also because the independent source issue in Young's case did not require the federal courts to determine whether there was a violation of the Fourth Amendment (the state courts found that Young had been arrested without probable cause), and did not involve the suppression of presumptively reliable physical evidence. In its opinion affirming the District Court's decision, the panel also discussed, in what is expressly labeled *dicta*, a number of social science studies documenting defects in certain eyewitness identification procedures, the substance of which not only was presented to the state courts in this case, but has also been known by the scientific community and recognized by courts, including this Court, for more than fifty years. Therefore, the questions actually presented in this case are:

I. Whether this Court should grant *certiorari* to review the Second Circuit's decision that *Stone v. Powell*'s non-jurisdictional bar to the consideration of Fourth Amendment claims in federal habeas proceedings was waived where: (a) the *Stone* bar was raised by the State for the first time on appeal following years of litigation in the District Court; (b) the claim which the State sought to have barred on appeal did not assert a straight Fourth Amendment violation, but instead challenged the existence of an independent source for an eyewitness' in-court identification of the defendant, an issue which affected the reliability of the trial itself; (c) the State failed to meaningfully challenge the correctness of the District Court's conclusion that the state court's finding of an independent source for the eyewitness identification involved an unreasonable application of clearly established federal law; and, (d) respondent (the habeas petitioner below) was prejudiced by the State's failure to assert the *Stone* defense in a timely manner?

II. Whether the Second Circuit's discussion of social science studies detailing the well-recognized problem of mistaken eyewitness identification was barred by this Court's decision in *Cullen v. Pinholster*, which limits review under 28 U.S.C. § 2254(d) to the state court record, under circumstances where: (a) the Second Circuit expressly stated that its decision was neither compelled nor controlled by the studies; (b) similar social science information was presented in support of respondent's claim in the state courts; and (c) the studies discussed by the Second Circuit reflect problems with eyewitness identification which courts, including this Court, have acknowledged and referenced for nearly fifty years?

III. Whether this Court should grant *certiorari* to review the Second Circuit's fact-bound determination that the state court decision finding an independent source for an in-court eyewitness identification both involved an unreasonable application of clearly established federal law and was based on an unreasonable determination of the facts in light of the evidence presented in state court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules and Regulations

Other Authorities

STATEMENT OF THE CASE

Because the State's Petition for Writ of Certiorari omitted numerous material facts, and thus provided the Court with a one-sided and misleading account of the proceedings below, Respondent's Statement of the Case will be longer than would otherwise be necessary to demonstrate the impropriety of further review in this case.

On the evening of March 29, 1991, an intruder entered the home of William and Lisa Sykes (Circuit Court Appendix [A] 112-116). This intruder wore a blanket "draped over his clothes." (A131.) He also wore a scarf "wrapped around his mouth" that covered his lips, nose, ears, and cheeks, leaving only his eyes uncovered (A 136-37). During the "five to seven" minutes the intruder was in the Sykes residence, the scarf always covered the intruder's face (A124-136-38).

Mrs. Sykes was able to tell that the intruder was a male (A122). With the scarf covering a majority of the man's cheeks, jawbone, and ears, the only parts of his face that she could see were his forehead, eyebrows, and eyes (A 136-39). But, as she later told the police, there was "[n]othing unusual that stood out" about his eyes, and she also did not notice anything "unusual" about the intruder's eyebrows or forehead. She also acknowledged that she screamed when she saw the intruder, and that she was "scared" and"petrified." (A 140, 142.)

In the police report taken that evening, which she signed, Mrs. Sykes, who is white, only described the perpetrator as "[a] black man in his twenties, five-ten, medium build." (A131, 175; Trial 1, 71-72.) The police asked her if she could assist in preparing a composite sketch of the intruder, but she declined, stating "I don't think

I can." (A131.)

At no point during the home invasion did Mrs. Sykes observe or identify the intruder's forehead, head or facial hair (if there was any), shoes, pants, or whether the intruder wore a hat or gloves (A134-39). She also did not notice whether the intruder bore any distinct physical characteristics, such as a scar or tattoo, or whether he wore any jewelry on any of his fingers. Mrs. Sykes would later explain that she did not pay attention to these details because she was "looking at his eyes"—eyes that she acknowledged were not in any way "unusual," or of a type that "stood out." (A138-40.)

On April 25, 1991—twenty-seven days after the incident—police showed Mrs. Sykes a photographic array containing six full-color photographs, one of which depicted Rudolph Young's[1] entire face. At a hearing held on April 30, 1991, Mrs. Sykes admitted that she selected someone other than Young from the photo array (A155-56).

On April 27, 1991, Young was unlawfully arrested.[2] That same day, Mr. and Mrs. Sykes separately observed a six-man lineup that included Young. Of the live lineup participants, Young was the only person whose picture police had also included in the photo array previously shown to the Sykes (Suppression Hearing, 218-19). Mr. Sykes did not identify Young; instead, Mr. Sykes concluded that the voice of participant #1 sounded most like the intruder, while the eyes and face of participant #5 most

---

[1]Young's first name is Rudolph, and that is how his name has been set forth in every pleading in both state and federal court until the State inexplicably named him "Rudolf" on the cover of the petition for certiorari.

[2] The Appellate Division subsequently held that there was no probable cause for the arrest. *People v. Young*, 202 A.D.2d 1024, 1024 (4th Dept. 1994).

resembled the intruder (Trial 1, 91). Young was neither participant #1 nor participant #5. Mrs. Sykes, on the other hand, purported to make a positive identification of Young based "just [on] his eyes and the voice." (A161).

In August 1993, Young was convicted after a jury trial on charges of robbery and burglary, due largely to Mrs. Sykes' in-court identification based on the prior lineup. On appeal, the Appellate Division, Fourth Department, unanimously reversed the convictions, finding that Young's arrest had occurred without probable cause, and that, "[b]ecause police obtained Young's consent to the line-up by means affected by the primary taint of his illegal arrest, it must be concluded that the [in-court] line-up identification flowed directly from the illegal arrest and was not attenuated therefrom." *People v. Young*, 255 A.D.2d 905, 906 (4th Dept. 1998); A91. The court ordered a new trial, but provided the prosecution with an opportunity to prove that Mrs. Sykes' in-court identification had "a basis independent of the unlawful arrest and tainted identification procedure." *Id.*

On March 11, 1999—eight years after the initial incident at the Sykes' residence—an independent source hearing was conducted to determine whether Mrs. Sykes would be permitted to make an in-court identification of Young at a re-trial. Mrs. Sykes, who was the only witness to take the stand at that hearing, testified that the intruder had a "[s]carf over his face and a blanket covering all his clothes," and that the scarf "covered up the intruder's mouth and chin" and ears, as well as the "majority of the intruder's cheeks and jawbone." (A131, 136-38.) She did not recall whether the intruder had a beard or a mustache, the length or kind of hair on his head, or even

whether he wore a hat (A138-144). She did not remember whether the intruder wore any jewelry such as a watch or bracelet, or what type of pants he was wearing (A141-43). She did not know whether the intruder had on a jacket underneath the blanket or was wearing gloves (A132), or whether he was muscular or had any "noticeable or distinct physical characteristics." (A138.) Instead, she admitted that she had been primarily "looking at" and "concentrating on" the intruder's eyes, and that there was "[n]othing unusual that stood out" about them (A140).

Mrs. Sykes acknowledged that almost immediately after the incident she was asked whether she would be willing to assist the police in sketching a composite drawing of the intruder's face, and that her response had been, "I don't think I can." (A131.) While she claimed to have told police that the intruder was in his late twenties and was light black in color (A125), she admitted that the official police report she signed on the night of the incident showed that she was only able to describe the intruder as "[a] black man in his twenties, five-ten, medium build." (A175.) Mrs. Sykes further testified that she had picked Young out of the lineup based only on his eyes and voice (A161).

Based on the testimony, the hearing court found that Mrs. Sykes "did demonstrate the ability to make an in-court identification," thereby clearing the way for a retrial (A195). In January 2000, Young was tried a second time on the robbery and burglary charges stemming from the incident at the Sykes residence nearly nine years earlier. The prosecution's case rested primarily on Mrs. Sykes' in-court identification of Young as the perpetrator (Trial II, 46). It also benefitted from the trial

court's exclusion – at the urging of the prosecutor – of expert testimony offered by the defense to explain the difficulty of making an independent identification after a tainted prior identification, and how the accuracy of an identification is adversely affected by factors such as the inability to see an assailant's face, the passage of significant time between observation and identification, circumstantial stress during the observation, and race differences between the observer and the subject. (Trial II, 308-363). Young was convicted as charged.

With two justices dissenting, the Appellate Division, Fourth Department affirmed Young's conviction on direct appeal. *People v. Young*, 20 A.D.3d 893 (4th Dept. 2005). With regard to Young's challenge to Mrs. Sykes' in-court identification, the majority held that the "Supreme Court properly determined that the People proved by clear and convincing evidence that the victim had an independent basis for her in-court identification" of Young. *Id*. at 893. A divided panel of the Court of Appeals of New York affirmed, with the majority acknowledging that Young's "argument has force," but declining to "disturb" the holding that there was an independent basis for the identification on the ground that it constituted "an issue of fact" that had been resolved adversely by the courts below.[3] *People v. Young*, 7 N.Y.3d 40, 44 (N.Y. 2006). Judge

[3]Young cited numerous scientific journals regarding identification evidence, perception, memory, and recall, in support of his appeals to both New York appellate courts (Appendix to Habeas Corpus Proceeding, 12, 13, 49, 53. 293-93, 324, 325). He also attached an appendix to his brief to the New York Appellate Division containing an article citing more than sixty studies regarding the factors impacting identifications evidence (Appendix to Habeas Corpus Proceeding, 132-145). Similarly, a memorandum Young filed with the trial judge during the independent source litigation also relied upon one of the primary social science treatises on eyewitness identification, Loftus, *Eyewitness Identification* (Harvard 1979) (referencing, relying upon, and summarizing

Smith dissented, concluding that "any in-court identification [was] impermissible as a matter of law." *Id.* at 48.

Young, proceeding *pro se*, timely sought federal habeas corpus relief, alleging, *inter alia*, that the state courts' determination that Mrs. Sykes had an independent source for her in-court identification was contrary to, and involved an unreasonable application of, clearly established federal law. The State filed an Answer addressing the merits of Young's allegations and raising various procedural defenses, including non-exhaustion. Significantly, however, neither the Answer nor any subsequent filing by the State during the four years the case remained pending before the federal Magistrate contained any suggestion that *Stone v. Powell*, 428 U.S. 465 (1976), barred consideration of Young's claim.

By agreement of the parties, the case was resolved by the Magistrate, who granted habeas relief on Young's claim that the Mrs. Sykes' identification was admitted in violation of his constitutional rights. *Young v. Conway*, 761 F.Supp.2d 59 (W.D.N.Y. 2011). The State sought reconsideration and alteration of the judgment pursuant to Rules 59(e) and 60(b). Neither request made any reference to *Stone*, and both were denied.

On appeal to the Second Circuit, the State argued – for the first time – that *Stone v. Powell* barred consideration of the independent source claim that had been

---

numerous social science studies documenting defects in eyewitness identifications similar to those referred to by the panel in this case). *See* Appendix to Habeas Corpus Proceeding, 183-88.

adjudicated by the Magistrate. In its brief in chief to the Second Circuit, the State neither acknowledged its persistent failure to raise the *Stone* defense below, nor discussed whether that defense could or should be applied when invoked for the first time on appeal. The State's brief also conspicuously failed to challenge the lower court's merits determination that there was no independent source for Mrs. Sykes' in-court identification.

In its opinion affirming the grant of relief, the Second Circuit first held that, as with every other non-jurisdictional defense in habeas, a federal court of appeals is not obligated to apply *Stone* when the State failed to raised it below. The court then considered whether the circumstances presented by this case nevertheless warranted an exercise of discretion to consider the *Stone* defense, and concluded that they did not:

> [D]espite four years and numerous opportunities to do so, the State never raised *Stone* and the record is bereft of any reason as to why it failed to do so .... On a petition that has been pending for over five years, that would constitute an unjustifiable waste of scarce judicial resources, undermining the comity and federalism concerns that also underlie *Stone*.

Young v. Conway, 698 F.3d 69, 86 (2d Cir. 2012).

With regard to the merits of the independent source issue, the Second Circuit found that "all six *Wade* factors weigh against a finding that Mrs. Sykes's in-court identification could derive from a source other than the tainted lineup," and that "the State failed to meet its burden to prove an independent basis by clear and convincing evidence." *Young*, 698 F.3d at 84 (referencing and applying analysis prescribed by *United States v. Wade*, 388 U.S. 218 (1967)). After noting that the "[New York] Court

of Appeals' determination otherwise was based on its mistaken impression that the independent source inquiry was an 'issue of fact' to be resolved by the trial court and upheld on appeal so long as there was 'support in the record,'" the Second Circuit held that "not only did the Court of Appeals apply the wrong legal standard, but also its conclusion constituted an unreasonable application of the correct standard ([*United States v.*] *Crews*, [445 U.S. 463 (1980),] and *Wade*) to the facts of this particular case." *Id.* at 84-85; *see also id.* at 85 (holding that state court's decision "was therefore both contrary to, and an unreasonable application of, Supreme Court law").

After missing the deadline prescribed by the rules, the State sought and received permission to file an untimely request for rehearing *en banc*. The request failed to garner a majority and was denied over the dissent of Judge Raggi (joined by Cabranes and Livingston, JJ.), who disagreed with the panel's determination that the State had forfeited its *Stone* defense, criticized the panel's *dicta* on social science studies as a violation of *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011), and contended that the state court's decision had not been sufficiently defective within the meaning of 28 U.S.C. § 2254(d) so as to warrant a grant of habeas relief. *See Young v. Conway*, 715 F.3d 79, 87 (2d Cir. 2013) (Raggi, J., dissenting).

Judge Parker, who had authored the panel decision affirming the grant of habeas relief, issued an opinion concurring in the denial of rehearing and addressing the dissent's contentions. He explained, *inter alia*, that: the panel's treatment of the *Stone* issue was a sound exercise of discretion driven by the circumstances of the case, and was entirely consistent with "the weight of authority," *id.* at 86 (Parker, J.,

concurring); that the *Pinholster* complaint was illusory inasmuch as the panel had been "explicit[]" in stating that its resolution of the independent source issue "was not 'compelled or controlled' by the [social science] literature [it] cited," and had instead referenced that literature merely in an effort "to point the bench and bar to the existence of the studies and to go no further[,]" *id.* at 81; and that the dissent's complaints about the panel's § 2254(d) analysis not only failed to account for what the state courts had and had not done, but they also went considerably farther than the State itself, "which elected not to contest the district court's conclusion on th[e] independent source] issue," *id.* at 84.

REASONS FOR DENYING THE WRIT

I. The Second Circuit properly found that *Stone v. Powell*'s non-jurisdictional bar to consideration of Fourth Amendment claims in federal habeas was waived where: (a) the State raised *Stone* for the first time on appeal after years of litigation in the district court; (b) the claim against which the State sought to invoke *Stone* did not assert a straight Fourth Amendment violation, but instead challenged the existence of an independent source for an eyewitness' in-court identification of the defendant, an issue which affects the reliability of the trial itself; (c) the State failed to meaningfully challenge the correctness of the District Court's conclusion that the state court finding of an independent source for the eyewitness identification involved an unreasonable application of clearly established federal law; and, (d) respondent was prejudiced by the State's failure to assert the *Stone* defense in a timely manner.

This Court has repeatedly held that the rule of *Stone v. Powell* is a non-jurisdictional bar to consideration of Fourth Amendment claims asserted in habeas corpus proceedings brought pursuant to 28 U.S.C. § 2254. *See Stone*, 428 U.S. at 494 n.37; *Withrow v. Williams*, 507 U.S. 680, 686 (1993). The Court has also made clear that, as a general matter, non-jurisdictional habeas defenses can be waived or forfeited when not timely raised by the state. *Trest v. Cain*, 522 U.S. 87, 89 (1997); *Day v. McDonough*, 547 U.S. 198 (2007); *Danforth v. Minnesota*, 552 U.S. 264, 289 (2008); *Wood v. Milyard*, 566 U.S.___, 132 S.Ct. 1826 (2012). While the courts of appeals retain some discretion to invoke and apply such defenses on a state's behalf, the exercise of that discretion must be informed (and is limited) by the circumstances of the individual case. *See*, *e.g.*, *Wood*, 132 S.Ct. at 1833.

The Second Circuit's resolution of the *Stone* issue in this case was fully consistent with this Court's cases, and did nothing to create (or exacerbate) a split in

the federal circuits. In suggesting otherwise, the petition for certiorari fails to cite even a single decision from a federal court of appeals rendered after this Court's decisions in *Trest*, *Day*, *Danforth*, and *Wood*. On the contrary, the best the State can muster as proof of disagreement among the lower courts is the 20-year old opinion of a divided Ninth Circuit panel in *Woolery v. Arave*, 8 F.3d 1325 (1993). While the *Woolery* majority did believe itself obligated to apply *Stone* "even though the state has failed to raise the issue," *id*. at 1326, that view failed to anticipate this Court's subsequent line of decisions firmly establishing that procedural defenses in habeas are generally subject to waiver and forfeiture, and it has not proliferated.[4] Furthermore, to the extent the State suggests that *Stone* is different from all other procedural defenses because it is "categorical" (as somehow distinguished from jurisdictional), and therefore not subject to the established rules of waiver, that approach has no basis in this Court's decisions,

---

[4]In the nearly two decades since *Woolery*, neither the Ninth Circuit nor any other federal court of appeals has endorsed or applied its treatment of *Stone* as non-waivable. In fact, the relevant portion of the *Woolery* opinion has only been cited once, in *Gonzalez v. United States*, 33 F.3d 1047, 1049 (9th Cir. 1994), en route to a finding that the government had waived a procedural defense.

In contrast to the *Woolery* majority's anachronistic view, other courts of appeals have long recognized that *Stone*, like other procedural defenses, is subject to waiver. *See Tart v. Massachusetts*, 949 F.2d 490, 504 (1st Cir. 1991) (reaching merits of Fourth Amendment claim in habeas proceeding because the Commonwealth had not asserted the *Stone* defense); *Davis v. Blackburn*, 803 F.2d 1371, 1372-73 (5th Cir. 1986) (per curiam) (noting that *Stone* is a "prudential" not a "jurisdictional" rule, and that, in appropriate cases, "a federal court is not foreclosed from *sua sponte* applying the principles of *Stone*"); *United States v. Ishmael*, 343 F.3d 741, 742-43 (5th Cir. 2003) (treating *sua sponte* invocation of *Stone* after government failed to raise it before district court as matter for court of appeals' discretion); *Wallace v. Duckworth*, 778 F.2d 1215, 1220 n.1 (7th Cir. 1985) ("Moreover, respondents never raised any *Stone v. Powell* argument, and since the rule of *Stone v. Powell* is not a jurisdictional rule, we need not raise the issue *sua sponte*." (citation omitted)).

and for good reason – it would obliterate the distinction between jurisdictional rules and procedural defenses, and create unnecessary and unworkable confusion.

In contrast to the State's demand for a special dispensation to avoid the consequences of its own litigation decisions, the Second Circuit's decision not to apply *Stone* in this case followed the path marked by this Court in *Wood* and prior decisions, taking careful account of the relevant circumstances and interests. The court observed, for example, that "despite four years and numerous opportunities to do so, the State never raised *Stone*" before the District Court, such that considering it for the first time on appeal "would constitute an unjustifiable waste of scarce judicial resources, undermining the comity and federalism concerns that also underlie *Stone*." *Young*, 698 F.3d at 86; *see also Granberry v. Greer*, 481 U.S. 129, 132 (1987) (noting "reluctance to adopt rules that allow a party to withhold raising a defense until after the 'main event' – in this case, the proceeding in the District Court – is over").

The Second Circuit also recognized that this case does not implicate the interests *Stone* was explicitly designed to protect, since the violation of Young's Fourth Amendment rights had been recognized by the state courts years earlier, had never been disputed in the federal litigation, and was merely antecedent (and practically incidental) to the independent source issue on which habeas relief had been granted. *See Young*, 698 F.3d at 87 (quoting *Stone*, 428 U.S. at 491 n.31) ("[I]t is difficult to imagine a case further afield from the 'typical Fourth Amendment claim, asserted on collateral attack' than this one, where the issue Young is 'asking society to redetermine'

has everything to do with 'the basic justice of his incarceration.'").[5] Indeed, as the Second Circuit further explained, Young's challenge, unlike the usual *Stone* scenario, was aimed at "the admission of evidence [*i.e.*, a highly suspect identification] that ... *lacks* the typical indicia of reliability that ordinarily weigh against re-litigating a Fourth Amendment claim on collateral review." *Id.* (citing *Stone*, 428 U.S. at 490) (emphasis added).

On top of those considerations, the Second Circuit further noted both that the State had presented only "scant argument on appeal challenging the district court's conclusion that the state court unreasonably applied *Wade*," *id.* at 76, and that "indulging" its demand for belated application of *Stone* "would require a remand to afford Young the opportunity to argue either why *Stone* does not apply or why he did not have a full and fair opportunity to litigate his claim," *id* at 86.[6] Taken together, the totality of the relevant factors made clear that application of *Stone* for the first time on appeal would incur substantial costs in both efficiency and fairness while yielding virtually none of the benefit the rule was designed to achieve. Given that balance, the

---

[5]In fact, this Court has intimated that the independent source inquiry, which is intended to assess the reliability of an eyewitness identification regardless of the source of the constitutional violation, *e.g.*, the Fourth, Fifth, Sixth or Fourteenth Amendments, is required as a matter of due process. *United States v. Crews,* 445 U.S. 463, 473 n.19 (1980).

[6]Had *Stone* been asserted before the District Court, Young would have been positioned to select from a variety litigation strategies. For example, he could have argued that he had not been afforded a full and fair opportunity to litigate his independent source claim in the state courts due to the state courts' application of the wrong legal standard. He also could have amended his petition to include a due process/suggestiveness challenge to the identification evidence.

Second Circuit's decision not to relieve the State of its forfeiture was a sound – not to mention exceedingly rare[7] – exercise of discretion that does not warrant review by this Court.

II: The Second Circuit's discussion of social science studies detailing the well-recognized problem of mistaken eyewitness identification did not contravene *Cullen v. Pinholster* because: (a) the Second Circuit expressly stated that its decision was neither compelled nor controlled by the studies; (b) similar social science information studies were presented in support of respondent's independent source claim in the state courts; and (c) the studies discussed by the Second Circuit reflect problems with eyewitness identification which courts, including this Court, have acknowledged and referenced for nearly fifty years.

In an argument comprising a single paragraph of its petition, the State contends that certiorari should be granted because "the panel here relied heavily on research that was never any part of the state court proceedings," and in so doing, contravened *Cullen v. Pinholster*, *supra.* Petition at 9. Importantly, however, the State offers no actual support for its characterization of the Second Circuit's reasoning; it makes no effort either to identify which pieces of social science information were not before the state courts, or to explain how they might have differed from the materials that *were* put before the state courts; and it fails to acknowledge that the ideas and observations expressed by the Second Circuit in this case have been part of the discourse across the federal judiciary for almost half a century. In short, there is no *Pinholster* issue here.

The Second Circuit did discuss social science literature on eyewitness

[7]As the meager catalog of court of appeals decisions confronting this issue indicates, attorneys for the states seldom fail to timely assert legitimate *Stone* defenses in federal habeas proceedings. Thus, the petition in this case does not present anything approaching a frequent or nationwide controversy.

identification. But it also went out of its way to declare that its resolution of the independent source issue was merely "reinforced, but not compelled or controlled by," that literature. *Young*, 698 F.3d at 79 n.8; *see also*, *id.* at 89 ("This research only reinforces our independent determination that the improper admission of Mrs. Sykes's uncorroborated identification testimony at Young's trial had a substantial and injurious effect on the jury's verdict."); *Young*, 715 F.3d at 81 (Parker, J., concurring) (emphasizing that panel "opinion is explicit that our conclusion that the in-court identification in question lacked an independent source was not 'compelled or controlled' by the literature we cited"). Rather, as Judge Parker explained in connection with the denial of rehearing, the purpose of mentioning the social science literature at all was simply "to point the bench and bar to the existence of the studies and to go no further." *Id.*

Moreover, it requires no great stretch to accept that the issues before the court – *i.e.*, whether there was an independent source for Mrs. Sykes' identification, and whether the state court's decision on that question was defective under § 2254(d) – were susceptible to resolution without the aid of so-called extrinsic material. After all, the District Court did just that, and the State found its decision on those issues so non-controversial that it did not even bother to contest them on appeal. *See Young*, 698 F.3d at 76 (opening "Discussion" section of opinion with observation that, "The State presents scant argument on appeal challenging the district court's conclusion that the state court unreasonably applied *Wade*"). Thus, the Second Circuit not only *could* have decided this case without resort to extrinsic social science literature, it has also made

clear that it actually *did* decide the case that way. The State's bald and conclusory assertion to the contrary provides no justification for refusing to take the court of appeals at its word.

Furthermore, even if the Second Circuit's decision could be read to depend upon information gleaned from social science studies, the State offers nothing to establish that the materials before the state courts did not contain that information. At every stage of the state court proceedings, Young cited scientific literature to support his challenge to the existence of an independent source for Mrs. Sykes' identification. In fact, the state court record is replete with citations to such literature. *See* Appendix to Habeas Corpus Proceeding, 12, 37, 45, 53, 132-145, 168, 187, 292, 293, 324, 325. In a memorandum submitted to the trial judge, for example, Young relied upon one of the leading social science treatises on eyewitness identification, which summarizes and references numerous other studies documenting the very concerns and shortcomings discussed by the panel in this case. *See* Appendix to Habeas Corpus Proceeding, 183-88. Similarly, the appendix to Young's brief to the New York Appellate Division included an article reviewing scientific research on perception, memory, recall, and factors impacting the reliability of identification testimony,[8] and citing more than sixty articles and books detailing experimental findings on these topics. *See* Appendix to Habeas Corpus Proceeding, 132-145.

If the vast array of social science information supplied to the state courts differed

---

[8]Brigham, Wasserman, and Meissner, *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues,* Court Review (Summer 1999).

in some material way from the information discussed in *dicta* by the Second Circuit, the State has neither identified nor explained any such difference. Absent such a showing, there is no basis from which to conclude that the Second Circuit not only deviated from the rule of *Pinholster*, but did so in a manner calling for intervention by this Court.

Finally, it bears noting that the Second Circuit's observations about the reliability of eyewitness identifications were not unique to this case, or foreign to even a casual student of criminal procedure, let alone a group of experienced state court judges. On the contrary, they echoed similar observations that this Court has been making for decades. *See*, *e.g.*, *Watkins v. Sowders*, 449 U.S. 341 (1981); *United States v. Crews*, 445 U.S. 463 (1980); *Manson v. Brathwaite*, 432 U.S. 98, 111-12 (1977); *Moore v. Illinois*, 434 U.S. 220 (1977); *Foster v. California*, 394 U.S. 440 (1969); *Simmons v. United States*, 390 U.S. 377, 383-84 (1968); *United States v Wade*, 388 U.S. 218 (1967). Together with the materials and citations actually provided to the state courts in this case, this Court's own decisions make it inconceivable that the Second Circuit's resolution of this case turned on – or was even materially influenced by – information to which the state courts were not privy.

III. The Second Circuit's fact-bound determination that the state court decision finding an independent source for an in-court eyewitness identification both involved an unreasonable application of clearly established federal law, and was based on an unreasonable determination of the facts in light of the evidence presented in state court is not worthy of certiorari.

Finally, the panel's resolution of the merits of Young's (lack of) independent

source claim involved a straightforward and fact-bound application of settled precedent to the record evidence. In *Crews*, 445 U.S. at 472–74, this Court set forth the test for determining when, as in this case, a witness may be permitted to present in-court identification testimony after an illegal arrest and a suppressed out-of-court lineup. First, the Court stated that its decision in *Wong Sun v. United States*, 371 U.S. 471 (1963), "articulated the guiding principle for determining whether evidence derivatively obtained from a violation of the Fourth Amendment is admissible against the accused at trial. In order to determine the answer to this question, courts must focus on whether "the victim possesses knowledge of and the ability to reconstruct the prior criminal occurrence and to identify the defendant from her observations of him at the time of the crime." *Crews*, 445 U.S. at 471. The Court in *Crews* cited with approval and applied the factors set forth in *Wade* for determining whether there are"independent origins" for the evidence. *Crews*, 445 U.S. at 473 n.18.

In *Wade*, this Court held that an in-court identification following an illegal lineup procedure (conducted in violation of the right to counsel) is not admissible unless the prosecution demonstrates by clear and convincing evidence that "the in-court identification was based upon observations of the suspect other than the [tainted] lineup identification." *Wade*, 388 U.S. at 240. *Wade* also set forth the following factors, applied by the Court in *Crews*, for making the "independent source" determination: (1) the prior opportunity to observe the alleged criminal act; (2) the existence of any discrepancy between any pre-lineup description and the defendant's actual description; (3) any identification prior to the lineup of another person; (4) a photographic

identification of the defendant prior to the illegal lineup; (5) the failure to identify the defendant on a prior occasion; and (6) the lapse of time between the alleged act and the lineup identification. *Id*. at 241. *Wade* also recognized that courts should consider facts concerning the conduct of the tainted lineup itself. *Id*. at 241.

The panel meticulously applied the *Wade* factors to the testimony at the independent source hearing in determining that the state court decision was objectively unreasonable. As detailed by the court of appeals, Mrs. Sykes: (1) "was afforded no meaningful opportunity to perceive [the perpetrator] ... given that his body was covered with a blanket and the entirety of his face below his eyes—including his lips, nose, ears, and cheeks—was covered by a scarf. And as for those eyes, ' nothing unusual ... stood out' about them," *Young*, 698 F.3d at 80; A136-40; (2) "was unable to assist the police in sketching a composite drawing of the intruder's face," *id*. at 74; A131; (3) gave a general description of the perpetrator which significantly varied from that of Young as to both age and height, *id*. at 83; A131, 175; and, (4) "offered differing testimony as to whether, from the photo array conducted one month after the crime, she selected someone other than Young as the perpetrator or failed to identify anyone at all," *id*. at 83; A156-57.

Additionally, more than a month went by between the incident and the lineup, one year elapsed between the incident and the first trial at which Mrs. Sykes' testimony was explicitly based on the lineup, and more than eight years passed between the incident and the independent source hearing. Given this time line, the Second Circuit observed:

> Early in this intervening one month—a not inconsiderable period of time—Mrs. Sykes failed to identify him (or worse, identified someone else) while being shown his photograph only one week after the alleged act.... There is no basis in the record to conclude that the reliability of Mrs. Sykes's identification somehow strengthened over the course of this month, or that she remembered details she had forgotten during the first photo array. The same is true of the year that passed between the robbery and her identification of Young at his first trial and the eight years separating the robbery from the independent source hearing.

Young, 698 F.3d at 84.

On, this record, both the Second Circuit and the Magistrate understandably found that none of the factors set forth in *Wade* and *Crews* for determining the admissibility of in-court identification testimony after an illegally conducted lineup weighed in favor of finding that there was an independent basis for Mrs. Sykes' identification at Young's retrial. *Id*. at 84; *Young v. Conway*, 761 F.Supp.2d 59, 75 (W.D.N.Y. 2011). The court also determined that § 2254(d)'s limitation on relief was satisfied:

> The [New York] Court of Appeals' determination otherwise was based on its mistaken impression that the independent source inquiry was an 'issue of fact' to be resolved by the trial court and upheld on appeal so long as there was 'support in the record.' Thus, not only did the Court of Appeals apply the wrong legal standard, but also its conclusion constituted an unreasonable application of the correct standard (*Crews* and *Wade*) to the facts of this particular case.

Young, 698 F.3d at 84–85 (quoting *Young*, 7 N.Y.3d at 44).

Consequently, both the Second Circuit and the Magistrate correctly held that the state court decisions finding that Mrs. Sykes' in-court identification of Young was

independent of the unconstitutional lineup were contrary to and involved an unreasonable application of this Court's precedent, and were based on unreasonable factual determinations in light of the evidence presented in the state courts. Indeed, the State's brief to the Second Circuit made no meaningful argument to the contrary; instead it chose to put all of its eggs in the *Stone* bar basket, which, as discussed *supra*, was raised for the first time on appeal.

Because the court of appeals faithfully applied this Court's precedents to the state court record, and was acutely cognizant of the deference due to state court decisions on federal habeas review, certiorari should be denied.

CONCLUSION

Petitioner has failed to show any compelling reason why this Court should consider this case. Therefore, the petition for a writ of certiorari should be denied.

Dated: Rochester, New York
August 15, 2013

Respectfully submitted,

/s/ Brian Shiffrin
Brian Shiffrin
Easton Thompson Kasperek Shiffrin LLP
16 West Main Street
Suite 243
Rochester, New York 14614
585-423-8290
bshiffrin@etksdefense.com
Counsel of Record

John H. Blume
Cornell Law School
112 Myron Taylor Hall
Ithaca, NY 14853-4901
(607) 255-1030